IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-6997

SANDRA LOCKETT

Petitioner

-vs-

THE STATE OF OHIO

Respondent

**********

RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

From the Supreme Court of Ohio

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## OPPOSITION TO JURISDICTION

Petitioner has failed to raise an issue of constitutional dimensions requiring review pursuant to 28 U.S.C. 1257(3).

## STATEMENT OF THE CASE

On January 15, 1975, Sydney Cohen was shot and killed in his pawn shop, located in downtown Akron, Ohio. On January 21, 1975, the Petitioner, Al Parker, Nathan Earl Dew, and James Lockett were indicted by the Summit County Grand Jury regarding the Cohen homicide. Each of the named defendants was charged with Aggravated Murder (felony murder) including Specifications, and Aggravated Robbery.

Prior to the commencement of any trial, the Petitioner, and each of the other defendants, were offered a negotiated plea by the State of Ohio. Al Parker, the self-confessed triggerman, was offered the dismissal of the specifications and robbery charge if he would plead guilty to Aggravated Murder and testify on behalf of the State of Ohio. Parker, who was scheduled to go on trial first, accepted this negotiated plea at the commencement of his trial.

The Petitioner, approximately two weeks prior to her trial, was offered the negotiated plea of Voluntary Manslaughter and Aggravated Robbery if she would cooperate with the State of Ohio. The Petitioner rejected this negotiation. James Lockett and Nathan Earl Dew were also offered the same negotiations presented the Petitioner. James Lockett and Dew also rejected these pre-trial negotiations.

Two days prior to the commencement of the Petitioner's trial on March 28, 1975, after the State had prepared its case, the Petitioner was offered the same negotiated plea that was accepted by Parker (Aggravated Murder). This offer was rejected. The offer was renewed on April 1, 1975, when the trial began and was again rejected by the Petitioner (Transcript, Volume I, Pages 71-73). The Petitioner was subsequently found guilty on April 3, 1975, by jury, of Aggravated Murder, with two Specifications, and Aggravated Robbery. The trial court, upon completion of the statutory sentencing requirements, found no mitigating circumstances and sentenced the Petitioner to death.

The trials of Nathan Earl Dew and James Lockett were conducted prior to the Petitioner's trial. Both Dew and James Lockett were offered the "Day of Trial" negotiation of Aggravated Murder. James Lockett and Dew both rejected the State's offers. Upon completion of their jury trials, Dew and James Lockett were each found guilty of Aggravated Murder with one Specification, and Aggravated Robbery. The trial court found mitigation in Dew's case, and sentenced Dew to life in prison. The trial court found no mitigation in James Lockett's case and sentenced him to death.

Since Dew had confessed, Al Parker's testimony was not used in the Dew trial. Al Parker did testify in the trial of the Petitioner and James Lockett. After the completion of the three trials, Al Parker was sentenced to life in prison,

pursuant to his prior guilty plea to Aggravated Murder.

The Ohio Ninth District Court of Appeals affirmed the convictions of the Petitioner, Nathan Earl Dew, and James Lockett. The Supreme Court of Ohio declined to hear Dew's appeal and affirmed the Petitioner's convictions. The convictions of James Lockett were reversed by the Ohio Supreme Court in State v. Lockett, 49 Ohio St.2d 71 (1976). James Lockett was retried, but the jury was unable to reach a verdict. A third trial by jury of James Lockett resulted in verdicts of guilty as charged. Mr. Lockett is currently awaiting sentencing.

## STATEMENT OF FACTS

Since the Respondent does not agree with the conclusions of fact presented by the Petitioner in her Statement of Facts, the State respectfully offers the following summary of evidence.

Al Parker testified that, prior to coming to Akron on January 14, 1975, he was a resident of Orange, New Jersey. During the weekend prior to coming to Akron, Parker indicated that he met, for the first time, Joanne Baxter and the Petitioner in Jersey City, New Jersey (Friday, January 10, 1975). Baxter and the Petitioner, residents of Akron, were visiting the New Jersey area, and were apparently staying with relatives (Transcript, Volume II, Pages 27-31).

As the weekend progressed, Parker introduced Baxter and the Petitioner to his friend, Nathan Earl Dew (Transcript, Volume II, Pages 36-37). Parker became attracted to Baxter, while Dew accompanied the Petitioner. During the remainder of the weekend, the couples separated.

On Monday, January 13, 1975, Dew borrowed sixty dollars from Parker, so that Dew could make bail for the Petitioner's brother, James Lockett (Transcript, Volume II, Pages 41-42). After James Lockett was released from jail, Joanne Baxter, the Petitioner, David Ford (the Petitioner's seventeen year old uncle), (Transcript, Volume II, Pages 42-43), and James Lockett planned to return to Akron in the

Petitioner's car.

Dew and Parker agreed to lead the Petitioner to the interstate highway for the return trip to Akron (Transcript, Volume II, Page 43). Because of bad weather and trouble with the Petitioner's car, Dew and Parker eventually accompanied the group all the way to Akron. Since Parker was the only one with money, he financed the group's trip home, including an overnight stay in Pennsylvania, from money that he had originally borrowed from his employer (Transcript, Volume II, Pages 44-45).

Parker and Dew arrived in Akron on January 14, 1975, with the Petitioner, James Lockett, Ford, and Baxter. After the Petitioner was taken to the local Methadone Clinic for her heroin substitute, and after Joanne Baxter was taken home, Parker and Dew, along with the others, eventually ended up at the Lockett residence (Transcript, Volume II, Pages 46-53).

Since James Lockett did not pay back Parker as planned, and because of no money to go home, Parker and Dew discussed pawning Dew's ring (Transcript, Volume II, Page 48). When the Petitioner and James Lockett became part of this conversation (with only Dew, Parker, James Lockett, and the Petitioner participating), the Petitioner suggested a robbery (Transcript, Volume II, Page 48). The Petitioner then proceeded to suggest and point out certain business establishments that might be suitable as a target for the robbery (Transcript, Volume II, Pages 46-56). Because none of the

four had a pistol, James Lockett suggested robbing a pawn shop where they could ask to see a pistol, load it, and then use it to rob the pawn shop (Transcript, Volume II, Pages 56-57). Since Parker already had four cartridges in his possession, Parker was elected to be the triggerman at the suggestion of James Lockett (Transcript, Volume II, Pages 56-57). The Petitioner offered to lead the group to the pawn shop, but suggested that she not actually go in because the pawn shop operator knew her (Transcript, Volume II, Page 56). After it was determined that the robbery would take place the next day, Dew and the Petitioner, using Parker's car, dropped Parker off at Joanne Baxter's house on Tuesday evening (Transcript, Volume II, Page 58).

The next morning, January 15, 1975, Dew, James Lockett, and the Petitioner, using Parker's car, picked up Parker at Baxter's apartment (Transcript, Volume II, Pages 58-59). According to Parker, the robbery plan called for Dew and James Lockett to enter Syd's Market Loan, in downtown Akron, pawning Dew's ring (Transcript, Volume II, Pages 60-61). Parker was then to follow, look at a pistol, and carry out the robbery. The Petitioner was to stay in Parker's car, wait two minutes, and then start the engine.

The actual robbery commenced during the noon hour with Dew and James Lockett entering the pawn shop as planned (Transcript, Volume II, Page 61). Approximately a minute later, Parker left the car and entered the pawn shop

(Transcript, Volume II, Page 61). Parker indicated that when he entered, the owner, Sydney Cohen, was the only person present besides Dew and James Lockett (Transcript, Volume II, Page 65). At Parker's request, Cohen showed him a pistol. Parker returned this pistol, at which point Dew pointed out a larger pistol, which Parker requested (Transcript, Volume II, Page 62). Parker then took two cartridges out of his pocket, loaded the pistol, and declared that this was a stickup (Transcript, Volume II, Page 63). The gun was pointed at Cohen with Parker's finger on the trigger. Parker testified that the weapon went off when Cohen grabbed at the pistol (Transcript, Volume II, Page 63). As Cohen went down, he activated the robbery alarm behind the counter (Transcript, Volume II, Pages 63-64). The trio ran when Parker indicated that the alarm had been pushed. Parker kept the gun as he ran for his car (Transcript, Volume II, Pages 65-66). The Petitioner was in Parker's car when he returned. The engine was running, but Dew and James Lockett did not return to Parker's car (Transcript, Volume II, Pages 72-73). The Petitioner took the gun Parker had taken from the pawn shop and put it in her purse (Transcript, Volume II, Page 67). Parker and the Petitioner proceeded to the home of the Petitioner's aunt, during which time Parker explained to the Petitioner what had happened (Transcript, Volume II, Page 67).

After staying a short time at the aunt's house,

Parker and the Petitioner left in a taxi which the Petitioner had called. Parker sat in the back seat on the passenger's side while the Petitioner sat behind the driver. The Petitioner then proceeded to give the driver directions to her parents' home. The taxi was stopped by a police car approximately three or four blocks from the aunt's house. As the officers approached the taxi, the Petitioner told Parker that she had placed the gun under the seat. Parker and the Petitioner were then taken into custody (Transcript, Volume II, Pages 68-70).

Parker testified that he and the Petitioner told the police that he was from Chicago and was currently renting a room from the Petitioner's mother. The Petitioner and Parker were released a short while later and returned to the Lockett residence and discovered that Dew and James Lockett had also returned home (Transcript, Volume II, Pages 72-73). The police investigation culminated in the arrests of Parker, Dew, James Lockett and the Petitioner.

The above rendition of facts was presented to the trial court through the testimony of Al Parker. To corroborate this co-defendant's testimony, the State presented the testimony of Ethel W. Garret, Ronda Reed, Joanne Baxter, Lowell Hayes, Billy Ray Berry and James Gasdaglis.

Mrs. Garrett testified that she was an employee of Guardian Alarm Service. Mrs. Garrett further testified that on January 15, 1975, at 12:51 p.m., she received an alarm

from Syd's Market Loan (Transcript, Volume II, Pages 94-97).

Ronda Reed, an employee of the recruiting station near Syd's Market Loan, testified that she was in front of the pawn shop at the time of the robbery and observed inside, three black males and one white man. Further, Ms. Reed noticed a shiny object in the hand of one of the black men. After the three black males ran out of the shop, Ms. Reed observed one black subject stuffing a gun into his pants (Transcript, Volume II, Pages 97-103).

Joanne Baxter's testimony corroborated that given by Al Parker concerning the trip from New York to Akron. Ms. Baxter further testified that the Petitioner, on the way to the Methadone Clinic on Tuesday, January 14, 1975, told Dew and Parker that she knew places that they could "knock off". On the return trip from the Clinic, Ms. Baxter testified that the Petitioner proceeded to show the others the businesses which were possibilities as robbery targets. Ms. Baxter stated that the Petitioner, Dew, Parker and James Lockett met together on Wednesday morning, January 15, 1975, in one of the bedrooms in Joanne Baxter's apartment. Finally, Ms. Baxter testified that she saw Al Parker Wednesday evening, at which time he advised her of what had happened at Syd's Market Loan (Transcript, Volume II, Pages 107-117).

Lowell Hayes, a driver for the Yellow Cab Company, testified that on Wednesday, January 15, 1975, at approximately 1:30 p.m., he picked up a man and woman at 168 Nieman Street,

Akron, Ohio, in Cab #52. Mr. Hayes identified the Petitioner as the woman in question. Mr. Hayes then testified that the Petitioner gave him directions to Tarbell Street which would have been a longer ride than the normal route. Further, Mr. Hayes testified that the normal route from Nieman to Tarbell would have put the cab closer to Syd's Market Loan than the route specified by the Petitioner. Finally, Mr. Hayes testified that the Petitioner first sat in the middle on the back seat, but moved directly behind him when the cab was stopped by the police. Mr. Hayes then drove back to the cab company, checked his cab in and left work for the day at approximately 2:00 or 2:30 p.m. (Transcript, Volume II, Pages 124-133).

Billy Ray Berry, another driver for the Yellow Cab Company, testified that on Wednesday, January 15, 1975, at 2:30 p.m., he recovered a gun from under the rear of the front seat (driver's side) from Cab #52. Mr. Berry gave the gun to James Gasdaglis, who, in turn, testified that he gave it to Mr. Edick, the cab company supervisor (Transcript, Volume II, Pages 133-139).

By stipulation it was determined that Sydney Cohen died from a single gunshot wound. The gun causing the wound was stipulated to have been part of the inventory at Syd's Market Loan. Finally, counsel stipulated that this same gun was recovered from Yellow Cab #52 which had contained Al Parker and the Petitioner (Transcript, Volume II, Pages 140-145).

The Petitioner, in her defense, attempted to present the testimony of Nathan Earl Dew and James Lockett. Both Dew and James Lockett immediately invoked their Fifth Amendment privilege, with their attorneys present (Transcript, Volume II, Pages 147-149, 158).

## PETITIONER'S FIRST REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE PROSECUTOR IN SUMMATION MADE IMPERMISSIBLE COMMENTS ON PETITIONERS FAILURE TO TESTIFY AND THEREBY VIOLATED HER RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

The State respectfully submits that the Petitioner's contention herein is without merit. The test which has been applied by most Federal courts when attempting to determine if prejudicial error has resulted from the prosecution's characterization of its own case as unrefuted and uncontradicted is whether or not the defendant is the only person who could refute the prosecution's evidence. If so, the prejudicial error is likely to be found. United States v. Bishop, 534 F.2d 214 (10th Cir. 1976); United States v. Handman, 447 F.2d 853 (7th Cir. 1971); United States v. ex rel. Leak v. Follette, 418 F.2d 1266 (2d Cir. 1969). The State maintains that no error occurred in the case at bar due to the fact that the Petitioner was not the only person who could have refuted the prosecution's case.

Further, the State submits that Petitioner misapplies Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229 (1965). Griffin, supra, dealt with blatant and continuous direct references to the defendant's failure to testify by the prosecutor. He stated that the defendant would know all the circumstances of the offense.

> "These things he has not seen fit to take the stand and deny or explain.
>
> And in the whole world, if anybody would know, this defendant would know.
>
> Essie Mae is dead, she can't tell you her side of the story. The defendant won't. Griffin, supra, at 611.

Additionally, the court instructed the jury as follows:

> As to any evidence or facts against him which the defendant can recisionably be expected to deny or explain because of facts within his knowledge, if he does not testify, or it, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

The jury in the Griffin case was explicitly instructed that defendants failure to testify was an indication that the other evidence was true. The prosecutor in Petitioner's case simply indicated that the evidence presented had been unrefuted and uncontradicted by the defense. In no way did the prosecutor imply that because the defendant did not testify that the other evidence was the truth. Neither, was the jury instructed to that effect. Prior to the statement, "Nothing. No evidence from the Defense," the prosecutor was speaking strictly to the evidence and testimony of third parties. No where does he make reference to the defendants

failure to testify. The State submits that in the context of the complete statement that the prosecutor would have been fairly understood to mean, no evidence from the defense, and rather than, no testimony from the defendant. The State maintains that the Petitioner has failed to demonstrate any prejudicial error.

## PETITIONER'S SECOND REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONAL VALIDITY OF PETITIONER'S SENTENCE OF DEATH.

### PART A

THE OHIO DEATH PENALTY STATUTES PLACE UNCONSTITUTIONAL LIMITATIONS UPON THE CONSIDERATION OF MITIGATING CIRCUMSTANCES.

The only capital offense in Ohio under its new criminal code is Aggravated Murder. The death penalty is precluded unless a person is convicted of Aggravated Murder, and an additional aggravating specification, by the trier of the facts. Ohio Revised Code, sections 2903.01, 2929.03, and 2929.04(A).

The death penalty is only considered at the sentencing state if a person is convicted of both the principal charge and the specification. If a person is convicted in such a manner, a separate hearing is conducted to consider mitigating factors, as set out in Ohio Revised Code, Section 2929.04(B).

> (B) Regardless of whether one or more of the of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the

evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The Supreme Court of Ohio automatically reviews all cases in which the death penalty has been imposed. Ohio Constitution, Article IV, Section 2.

Petitioner contends that Ohio's capital punishment statute has the same deficiencies as were found to exist in North Carolina and Louisiana. Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), Cf. Roberts v. Louisiana, 45 L.W. 4584 June 7, 1977. Those state capital punishment statutes were struck down becuase they had mandatory death sentences for certain classes of offenders, regardless, of the circumstances of the offender.

However, an analysis of Ohio's capital punishment statute shows that it is similar to that of Florida. Fla. Stat. Ann., section 491.141. Proffitt v. Florida, infra. The sentencing procedure is at a bifurcated hearing, which only occurs after the trier of facts has found that the offender has committed aggravated murder with a particular specification, beyond a reasonable doubt. At the

mitigation hearing any relevant evidence may be produced. The Ohio Supreme Court has held that:

> Syllabus 2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R.C. 2929.04(B)(2) and (3) was established by a preponderance of the evidence. State v. Bell (1976), 48 Ohio St.2d 270.

While youth of the offender, and his lack of a prior criminal record are not specifically enumerated as separate mitigating factors they are considered by the Ohio Courts. Jurek v. Texas, 428 U.S. 262 (1976), upheld Texas' capital punishment statute even though none of the particularized mitigating factors were enumerated. The constitutionality of the Texas procedures was sustained because they allowed consideration of mitigating factors. Jurek v. Texas, 262, 271-272.

Additionally the Ohio Supreme Court has stated:

> 1. For the purpose of the mitigation inquiry, the words "Psychosis or mental deficiency," as contained in R.C. 2929.04(B)(3), authorize the trial judge or panel to use the broadest possible latitude in determining the defendant's mental state or capacity.
>
> 2. Under R.C. 2929.04(B)(3), a convicted defendant's mental state or capacity should be considered in light of all the circumstances, including the nature of the crime itself, so that it may be determined whether the condition found to have existed was the primary produc-

ing cause of his offense. State v. Black (1976), 48 Ohio St.2d 262.

Since Ohio has three specific mitigating factors enumerated and considers other mitigating factors in the same manner as Texas, Respondent submits that there are no constitutional infirmities in the mitigation portion of its capital punishment statute.

The Ohio Supreme Court has reviewed approximately twenty death sentences, and reversed only one (State v. James Lockett (1976), 49 Ohio St.2d 71 which originated from Summit County). However, of the total number of cases (28) from Summit County in which a defendant was charged with a capital offense, only thirteen reached the mitigation stage, five of those defendants including the Petitioner now face the death penalty. Thus, it can be seen that a court can and does apply the mitigating factors where they are applicable.

Petitioner fails to show how the factors she complains of with respect to mitigation even apply to her. The State submits the nature of the crime, and all the other circumstances surrounding the Petitioner weigh heavily against, not for mitigation.

In summary, Ohio's capital punishment statute is not mandatory, and allows the broadest possible consideration of the defendant's mental state, age, and her circumstances including the nature of the crime in determining the applicability of the death sentence.

## PART B

DEATH IS A DISPROPORTIONATELY SEVERE AND UNCONSTITUTIONAL SENTENCE FOR ONE WHO HAS NOT TAKEN LIFE, ATTEMPTED TO TAKE LIFE OR ACTUALLY INTENDED TO TAKE LIFE.

Ohio Revised Code Section 2923.03 provides in part:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:....
>
> (2) aide or abet another in committing the offense...
>
> (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal.

The Petitioner, Nathan Earl Dew, Al Parker and James Lockett willingly formulated a common plan to rob Sydney Cohen, which included the planned use of a deadly weapon. In fact it was the Petitioner who suggested a robbery and proceeded to point out certain business establishments that might be suitable targets. Further, all four participants knew beforehand that Al Parker would place the live cartridges into the stolen gun. Finally, the death of Sydney Cohen was not only the proximate result of the Aggravated Robbery, but also was a consequence that could have been reasonably anticipated by the participants. Although the Petitioner did not pull the trigger, she willingly participated in every stage of the planning and perpetration of the Aggravated Robbery which resulted in Cohen's death.

In Scales v. United States, 367 U.S. 203, 225 (1961), this court held that conspiracy and complicity "are particular legal concepts manifesting the more general principal that society, having the power to punish dangerous behavior cannot be powerless against those who work to bring about that behavior." The perpetration of the Aggravated Robbery may never have occurred, but for Petitioner's suggestion of Sydney Cohen's pawn shop as a suitable target.

This Court defined the elements of aiding and abetting in Nye and Nissen v. United States, 336 U.S. 613, 619 (1949) as follows:

> In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." L. Hand, J., in United States v. Peoni, 2 Cir., 100 F.2d 401, 402 (1938).

The jury, by its return of a guilty verdict, determined that the Petitioner was acting with the kind of culpability i.e. purposefullness, required for the commission of Aggravated Robbery and Aggravated Murder. Irrespective of the fact that she did not pull the trigger, she was acting with the same guilty intent as the actual triggerman and therefore liable for the consequences. To contend as Petitioner does, that her participation was minor and that her intent was not to take a life is contrary to the guilty verdict returned

by the jury.

Further, courts have consistently held that an aider and abettor may be convicted and punished as a principal. Turberville v. United States, 303 F.2d 411, cert. denied, 370 U.S. 946 (1962), United States v. Rector, 538 F.2d 225, cert. denied, __ U.S. __ (1976), and United States v. Good Shield, 544 F.2d 950 (1976), citing Perevia v. United States, 347 U.S. 1, 9 (1954). The State respectfully submits that the death penalty is not disproportionately severe nor an unconstitutional sentence for one who has been found guilty of acting with the same guilty intent to accomplish the same purpose as the actual triggerman.

## PART C

THE OHIO DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THEY DENY THE CAPITALLY ACCUSED THE RIGHT TO A JUDGMENT OF HIS PEERS AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES, AND THE APPROPRIATENESS OF THE PENALTY OF DEATH.

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. Proffitt v. Florida, infra.

It is a somewhat analomous argument to say that juries will sentence more even handedly than judges in capital case. Juries do not ordinarily take part in the sentencing procedures in our system of criminal justice. They have a one shot opprotunity to exercise this function. To say that they will be less arbitrary, and capricious than a trial judge who is experienced in the area of sentencing as it applies to the entire milieu of criminals, defies logic. A jury does not have the ability to compare the offender before it, with the other defendants similarly situated.

Petitioner facilely remarks that jury nullification is minimized by taking unbridled jury discretion away from juries in the face of mandatory death penalties, but implies that Ohio has a problem with jury nullification. That

argument is specious for two reasons. First, Ohio does not have a mandatory death penalty. Second, the jury does not make the sentencing decision.

Petitioner asserts that the jury should have the opportunity to weigh the aggravating and mitigating factors. It should be emphasized again, that the jury does determine the presence or absence of aggravating specifications. The jury considers the more factual aspects of the death penalty decision in considering whether a specification exists, or not. For example, in the instant case the jury found the Petitioner guilty of murder during the commission of Aggravated Robbery. Ohio Revised Code Section 2929.04(A)(7) (Specification).

Before the mitigation hearing the trial court is required to have a pre-sentence investigation and a psychiatric examination made. Ohio Revised Code Section 2929.03(D). These reports provide a wealth of information concerning "the character, conduct and record of the individual offender." Thus, the judge considers the usual sentencing criteria, in the mitigation hearing. The defendant has the advantage of a jury making statutorily guided decisions, and a judge evaluating him on an individual basis before the imposition of the death penalty.

If this Court determined that Florida's capital punishment statute withstood constitutional muster, Proffitt v. Florida, infra, then Ohio's statute should likewise meet

both the aggravating, and mitigating factors. In Ohio, the jury has already determined that an aggravating factor existed beyond a reasonable doubt. Accordingly, one must conclude that Ohio has gone further than the Supreme Court has required, in allowing the jury to take part in a portion of the death penalty decision making process. Since there is no constitutional requirement that a jury must take part in the sentencing process, Petitioner's argument herein is without merit.

## PART D

OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSIBLY PENALIZE EXERCISE OF THE RIGHTS TO PLEAD NOT GUILTY AND TO HAVE A JURY TRIAL.

Petitioner misapplies United States v. Jackson, 390 U.S. 570 (1968). That case held that a federal statute had an impermissibly chilling effect upon the right to trial by jury because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

This is not the case in Ohio. Under the Ohio statute, the death penalty is applicable whether trial is by jury or a three judge panel. The death penalty may be avoided under either choice.

The chilling effect on the right to trial by jury found in United States v. Jackson, supra, is simply not present in this case. Petitioner's conclusion that there is a more lenient sentencing standard for a three judge panel is unsupported. Whether there are three judges or one judge, they are presumed to follow the law.

## PART E

OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSIBLY SHIFT TO THE DEFENDANT CONVICTED OF AGGRAVATED MURDER WITH SPECIFICATIONS THE BURDEN OF PROVING FACTS WHICH DISTINGUISH THOSE WHO MAY LIVE FROM THOSE WHO MUST DIE.

Mullaney v. Wilbur, 421 U.S. 684 (1975) held that the Due Process Clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The Court held that the Maine statute requiring the defendant to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter, violated this requirement, and that in fact the State was required to prove the absence of this fact.

Respondent strongly contends that the rule of law enunciated in Mullaney does not apply to sentencing. One can readily distinguish proof of an element of a crime from evidence presented at sentencing. The former is a presentation of the facts necessary to support each element of the crime. The Respondent accepts the burden of proving each element of the crime of aggravated murder beyond a reasonable doubt. It did so in this case.

However, sentencing and the procedures therein are a different matter. In State v. Downs, 51 Ohio St.2d 47 (1977), the Ohio Supreme Court overruled paragraphs 11 and 12 of the syllabus of State v. Lockett, 49 Ohio St.2d 48, 358

N.E.2d 1062 (1976), and the language which appears in State v. Woods, 48 Ohio St.2d 127 at 135, 357 N.E.2d 1059 at 1065 (1976), which reads: "(t)his is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation". In neither case did the trial court require the defendant convicted of aggravated murder to prove certain mitigating circumstances by a preponderance of the evidence in order to be sentenced to life imprisonment, rather than to death. Thus, the cited sections were held to be dicta.

The Downs opinion stated that it is the court that has the initial responsibility to require certain evidence to be collected and certain examinations to be made. From a careful consideration of those reports and of the evidence presented during the course of the trial, the judge, or panel of judges, decides whether mitigation is established by a preponderance of the evidence. If the defendant chooses not to present any evidence, the trial court may nonetheless find in his favor. If he chooses to present evidence, the court must consider any such testimony or documentary proof relevant to the sentencing decision. This requires that the defendant bear the risk of nonpersuasion during the mitigation hearing, but does not impose an unconstitutional burden upon a defendant which would render the Ohio statutory framework for the imposition of capital punishment unconstitutional. Nor, does it make the lack of mitigating factors an additional and

constitutionally mandated element of a capital offense, and the state is not constitutionally required to prove the lack of such mitigating factors beyond a reasonable doubt.

This Court sustained Florida's capital sentencing structure which is similar to the Ohio statute. Proffitt v. Florida, 428 U.S. 242 (1976). In determining that the death sentence should be imposed, the trial judge need only find that the mitigating factors are insufficient to outweigh the aggravating factors. Fla. Stat. Ann., section 921.141(3) (Supp. 1976-1977). Even when the jury recommends life, the trial judge may impose the death penalty where the facts supporting the death penalty are so clear and convincing that "Virtually no reasonable person could differ". Tedder v. State, 322 So.2d 908, 910 (1975).

Respondent submits that there are no constitutional infirmities in the mitigation portion of its capital punishment statute.

## PETITIONER'S THIRD REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE INSUFFICIENTLY EXAMINED EXCLUSION FOR CAUSE OF PROSPECTIVE JURORS WITH CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT.

The State respectfully submits that the Petitioner's reliance on Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770 (1968) is misplaced in that Mr. Justice Stewart began his discussion of the first issue by stating:

> The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who stated that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. (Witherspoon, supra, 88 S. Ct. at 1772).

The record herein reveals that the subject of capital punishment was broached during voir dire for the sole purpose of determining which veniremen could not perform their sworn duties as jurors because of their views on the death penalty. The State did not, contrary to the Petitioner's wholly unsupported allegation, attempt to disqualify any veniremen simply because he or she was opposed to capital punishment. Further, the record also reveals that counsel for the Petitioner was afforded broad latitude by the trial court in pursuing their voir dire examination. Therefore, the State maintains that the contention by the Petitioner

presented herein constitutes mere speculation and is wholly without merit.

## PETITIONER'S FOURTH REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO SUPREME COURT, BY GIVING RETROACTIVE APPLICATION TO A NEW CONSTRUCTION OF OHIO REVISED CODE SECTION 2929.03(A) GOVERNING COMPLICITY, DENIED PETITIONER'S RIGHT TO FAIR WARNING OF A CRIMINAL PROHIBITION AND THEREBY DEPRIVED HER OF HER LIFE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner bases her final argument for the granting of certiorari on her belief that the Ohio Supreme Court's "surprising interpretation " of Ohio Revised Code Section 2923.03(A) was an "anomalous construction" that was reached "retroactively without warning". Petitioner contends that the opinion required no proof of culpability to convict and punish an aider and abettor as a principal. On the contrary, throughout the opinion the court emphasizes, proof that the Petitioner had purposeful intent to kill is established through her participation in a criminal conspiracy which would be reasonably likely to produce death.

The State submits that this interpretation is neither surprising nor anomalous but is consistent with the pre-1974 case law that the Legislative Service Commission states is codified in Ohio Revised Code Section 2923.03, effective January 1, 1974. The essence of these cases is that through participation in a criminal conspiracy that is reasonably likely to produce certain results, the intent to produce those results can be presumed. Petitioner contends

that prior to the time that the new criminal code became effective, an aider and abettor could be prosecuted and punished as if he were the principal offender, whether or not he possessed the same "mens rea" as the principal offender. This is not the case. In Woolweaver v. State, 50 Ohio St. 277, 281, 34 N.E. 352 (1893), the court held that, "one person is never charged with the wrongful act of another except such act is the result of conspiracy to do it, the natural result or probable outgrowth of a conspiracy to do a wrong, or the person sought to be charged is an actual participant in the act itself...." The court went on to say, "...the knowledge of the commission of the fact is brought home to the party to be charged, either actually, or as a necessary inference from the proofs, that he was of the party of the wrongdoer, and engaged with him in some common wrongful enterprise.

The State respectfully submits that the case law has consistently followed this principal and the trial court properly relied on it. In State v. Palfy, 11 Ohio App.2d 142, 229 N.E.2d 76 (1967) a case remarkably similar to the instant case the court held:

> If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal killer as an aider and abettor in the homicide, even though the aider and abettor was not aware of the particular weapon used to accomplish the killing. An intent to kill by the aider and abettor may be found to

exist beyond a reasonable doubt under such circumstances. See also, State v. Doty, 94 Ohio St. 258, 113 N.E. 811 (1916).

The State respectfully submits that in light of pre-1974 case law and its subsequent codification, the Petitioner certainly had fair notice that by participating in the planning and commission of the robbery and by acquiesing in the use of a deadly weapon to accomplish the robbery, she would be held liable for the taking of the victims life which was endangered by the manner and means of performing the act conspired. Petitioner was "acting with the kind of culpability required for the commission of an offense" when she knowingly participated in the criminal conspiracy.

## CONCLUSION

The Respondent respectfully requests this Court, pursuant to the argument offered, to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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